Pamol (Sabah) Ltd & Anor v Joseph bin Paulus Lantip & Ors

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(IM)-353 OF 2010
ABDUL MALIK ISHAK, KANG HWEE GEE AND AZHAR MA'AH JJCA
8 JUNE 2012

B

Civil Procedure — Striking out — Application to strike out writ and statement of claim — Whether commencement of present suit gave rise to multiplicity of proceedings — Whether process of court had been used in bona fide manner — Whether there was abuse of process of court — Rules of the High Court 1980 O 18 r 19

C

D

Companies and Corporations — Separate legal entity — Lifting veil of incorporation — Whether defendants operated as group enterprise — Whether appropriate case to lift corporate veil of fourth defendant

E

Pamol Plantations Sdn Bhd ('the first defendant'), a private limited company incorporated in Malaysia, had entered into a share sale agreement with the six plaintiffs, who were businessmen residing in Sabah, to purchase the six plaintiffs' shares in Pelangi Jadi Sdn Bhd ('Pelangi'). It was a pre-condition of the share sale agreement that the six plaintiffs had to acquire 20,000 acres of certain plots of land ('the lands') and have leases of those lands registered in the name of Pelangi. At the same time the plaintiffs also entered into a shareholders agreement with the first defendant, Unipamol Malaysia Sdn Bhd (the second defendant, and Pamol (Sabah) Ltd ('the third defendant'). The shareholders agreement was intended to regulate the relationship of the plaintiffs, the first defendant and the second and third defendants, who were shareholders of the first defendant. The second defendant had granted Unitangkob (M) Sdn Bhd ('Unitangkob'), a company formerly known as Pelangi that was beneficially owned by the plaintiffs, a loan in order to enable the plaintiffs to purchase the lands. When Unitangkob defaulted in its loan repayment, the second defendant had instituted proceedings against it. This writ action ('the first suit') sought for the recovery of a sum in excess of RM5m from Unitangkob. In its defence Unitangkob pleaded breach, misrepresentation, inequitable conduct and the defence of estoppel. In the first suit, Unitangkob identified the first, second and third defendants as parties to the agreements and also identified the first and third defendants as agents and or subsidiaries of the second defendant. Subsequently the plaintiffs commenced a suit against the first, second and third defendants and Unilever PLC (the fourth defendant) for alleged misrepresentation, conspiracy and fraud. The plaintiffs' claims against the four

F

G

H

I

A defendants were founded on, inter alia, the share sale agreement the shareholders agreement. Although the fourth defendant was not a party to the share sale agreement and the shareholders agreement, the plaintiffs sought to lift the corporate veil and make the fourth defendant liable for the conduct of its subsidiaries. The third and fourth defendants filed an application to strike B out the plaintiffs' claims against them pursuant to O 18 r 19 of the Rules of the High Court 1980 and/or the inherent jurisdiction of the High Court. The High Court dismissed the third and fourth defendants' application to strike out. This was the third and fourth defendants' appeal against that decision. The third and fourth defendants submitted that the plaintiffs' claims would lie only C against the first and second defendants and that all four defendants were at all material times separate legal entities possessed of separate rights and liabilities and traded in that way.

D **Held**, dismissing the third defendant's appeal with costs but allowing the fourth defendant's appeal with costs:

(1) In company law, a company had a personality that was distinct from that of its shareholders and subsidiary companies. However, the plaintiffs in the present case sought to lift the corporate veil to make the fourth E defendant liable for the conduct of its subsidiaries. Although there were situations when the courts would look beyond that personality, the present case was not an appropriate case for the veil of incorporation to be lifted. There was a failure on the part of the six plaintiffs to particularise the plea that all the four defendants operated as a group enterprise F constituting one single commercial unit as distinct from being separate legal entities. There was therefore no necessity to lift or pierce the corporate veil of the fourth defendant (see paras 16–22).

(2) The commencement of the present suit gave rise to a multiplicity of proceedings because it sought an adjudication of matters that were G currently the subject matter of dispute in the first suit, which was between the second defendant and Unitangkob. As the claims in the first suit and in the present suit were the same, the plaintiffs were precluded from raising in the present suit what could have been litigated by them in the first suit (see paras 23–25). H

(3) Based on the evidence it was clear that the fourth defendant was not a party to any of the transactions, namely the share sale agreement or the shareholders agreement that formed the subject matter of the first suit as well as the present suit. The introduction of the fourth defendant as a I party to the present suit more than three years after the lapse of the agreements and whilst the first suit was still pending smacked of an abuse of the process of the court. It was ideal that an action ought to be struck out if the process of the court had not been used in a bona fide manner and had been abused. Thus, the fourth defendant's appeal was allowed

with costs of RM10,000. However, although the third defendant was not a party to the share sale agreement, it was a party to the shareholders agreement. Consequently, the third defendant's appeal was dismissed with costs of RM10,000 (see paras 27–32, 35, 36).

[Bahasa Malaysia summary

Pamol Plantations Sdn Bhd ('defendan pertama'), sebuah syarikat sendirian berhad yang diperbadankan di Malaysia, telah memeterai perjanjian penjualan saham dengan keenam-enam plaintif, yang merupakan ahli perniagaan yang tinggal di Sabah, untuk membeli saham keenam-enam plaintif dalam Pelangi Jadi Sdn Bhd ('Pelangi'). Adalah menjadi satu pra-syarat perjanjian jualan saham bahawa keenam-enam plaintif perlu memperolehi 20,000 ekar plot-plot tanah tertentu ('tanah-tanah') dan mempunyai pajakan tanah-tanah yang didaftarkan di bawah nama Pelangi. Pada masa yang sama pihak plaintif juga telah memeterai perjanjian pemegang saham dengan defendan pertama, Unipamol Malaysia Sdn Bhd (defendan kedua, Pamol (Sabah) Ltd ('defendan ketiga'). Perjanjian pemegang saham bertujuan untuk mengawal selia hubungan plaintif, defendan pertama dan defendan kedua dan ketiga, yang merupakan pemegang saham defendan pertama. Defendan kedua telah diberikan Unitangkob (M) Sdn Bhd ('Unitangkob'), sebuah syarikat yang dahulunya dikenali sebagai Pelangi yang telah dimiliki secara benefisial oleh plaintif, pinjaman untuk membolehkan plaintif untuk membeli tanah. Apabila Unitangkob gagal dalam pembayaran balik pinjaman, defendan kedua telah memulakan prosiding terhadapnya. Tindakan writ ini ('saman pertama') dipohon untuk mendapatkan semula jumlah lebihan RM5 juta daripada Unitangkob. Dalam pembelaannya, Unitangkob memplidkan pelanggaran, salahnyataan, kelakuan tidak berekuiti dan pertahanan estopel. Dalam saman pertama, Unitangkob mengenal pasti defendan pertama, kedua dan ketiga sebagai pihak kepada perjanjian dan juga mengenal pasti defendan pertama dan ketiga sebagai ejen dan atau anak-anak syarikat defendan kedua. Berikutan itu, plaintif memulakan saman terhadap defendan pertama, kedua dan ketiga dan Unilever PLC (defendan keempat) bagi salah nyata, dakwaan konspirasi dan penipuan. Tuntutan plaintif terhadap keempat-empat defendan telah bersandarkan pada, antara lain, perjanjian penjualan saham perjanjian pemegang saham. Walaupun defendan keempat bukan merupakan satu pihak kepada perjanjian jualan saham dan perjanjian pemegang saham, plaintif cuba untuk menyingkap tabir korporat dan membuatkan defendan keempat bertanggungjawab bagi penjalanan kuasanya subsidiari. Defendan ketiga dan keempat memfailkan permohonan untuk membatalkan tuntutan plaintif terhadap mereka menurut A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 dan/atau bidang kuasa sedia ada Mahkamah Tinggi. Mahkamah Tinggi menolak permohonan pembatalan oleh defendan ketiga dan keempat. Ini adalah rayuan defendan ketiga dan keempat terhadap keputusan tersebut. Defendan ketiga dan keempat menghujahkan bahawa tuntutan plaintif akan bersandarkan pada defendan pertama dan kedua dan bahawa kesemua empat

defendan, pada masa material, merupakan entiti berasingan hak dan liabiliti berasingan dan diperdagangkan sedemikian.

Diputuskan, menolak rayuan defendan ketiga dengan kos tetapi membenarkan rayuan defendan keempat dengan kos:

(1) Dalam undang-undang syarikat, sebuah syarikat mempunyai personaliti yang berbeza daripada pemegang saham dan syarikat-syarikat subsidiari. Walau bagaimanapun, plaintif dalam kes ini cuba untuk menyingkap tabir korporat untuk membuatkan defendan keempat bertanggungjawab ke atas anak syarikatnya. Walaupun terdapat situasi apabila mahkamah akan melihat melampaui personaliti yang, kes ini bukanlah kes yang sesuai untuk menyingkap tabir pemerbadanan. Terdapat kegagalan di bahagian keenam-enam plaintif untuk memperihalkan pengakuan bahawa keempat-empat defendan yang dikendalikan sebagai sebuah kumpulan syarikat membentuk satu unit tunggal komersial berbeza dengan entiti undang-undang berasingan. Oleh itu terdapat keperluan untuk menyingkap atau menusuk tabir korporat defendan keempat (lihat perenggan 16–22).

(2) Permulaan saman ini menimbulkan kepelbagaian prosiding kerana ia memohon pengadilan perkara-perkara yang kini hal perkara pertikaian dalam saman yang pertama, yang merupakan antara defendan kedua dan Unitangkob. Oleh kerana tuntutan dalam saman yang pertama dan dalam saman ini adalah sama, plaintif telah dihalang daripada membangkitkan dalam saman ini yang boleh dilitigasikan oleh mereka dalam saman yang pertama (lihat perenggan 23–25).

(3) Berdasarkan bukti, adalah jelas bahawa defendan keempat bukan pihak kepada mana-mana urus niaga, iaitu perjanjian saham penjualan atau perjanjian pemegang saham yang membentuk perkara saman pertama serta saman ini. Pengenalan defendan keempat sebagai sebuah pihak untuk saman ini lebih daripada tiga tahun selepas luput perjanjian manakala saman pertama masih tertunda akibat penyalahgunaan proses mahkamah. Adalah sesuai bahawa tindakan sepatutnya dibatalkan jika proses mahkamah belum digunakan dalam cara yang bona fide dan telah disalahgunakan. Oleh itu, rayuan defendan keempat telah dibenarkan dengan kos RM10,000. Dengan itu, walaupun defendan ketiga bukan merupakan satu pihak kepada perjanjian jualan saham, ia adalah pihak kepada perjanjian pemegang saham. Oleh itu, rayuan defendan ketiga telah ditolak dengan kos sebanyak RM10, 000 (lihat perenggan 27–32, 35, 36).]

Notes

For cases on lifting the veil of incorporation, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 865–893.

For cases on striking out, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7425–7635.

Cases referred to

ATA Management Consultants Sdn Bhd v Makmuran Sdn Bhd [2004] 3 CLJ 53, CA (refd)

Aron Salomon (Pauper) v A Salomon and Company, Limited, A Salomon and Company, Limited v Aron Salomon [1897] AC 22, HL (refd)

Buckland v Palmer [1984] 1 WLR 1109, CA (refd)

Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors [2001] 6 MLJ 417, HC (refd)

Hadi bin Hassan v Suria Records Sdn Bhd & Ors [2005] 3 MLJ 552; [2004] 8 CLJ 225, HC (refd)

Indah Desa Saujana Corporation Sdn Bhd & Ors v James Foong Cheng Yuen & Anor, Judge, High Court Malaya [2008] 2 MLJ 11; [2008] 1 CLJ 651, CA (refd)

Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637; [1999] 4 CLJ 533, CA (refd)

People's Insurance Co (M) Sdn Bhd v People's Insurance Co Ltd & Ors [1986] 1 MLJ 68 (refd)

Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533, FC (refd)

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and another [1975] AC 581, PC (refd)

Yeng Hing Enterprise Sdn Bhd v Liow Su Fah [1979] 2 MLJ 240, FC (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(b), (1)(d)

Appeal from: Civil Suit No 22–864 of 2002 (MT2) (High Court, Johor Bahru)

K Shanti Mogan (Ho Wei Lih with her) (Shearn Delamore & Co) for the third and fourth defendants/appellants.

Chetan Jethwani (Kumar Partnership) for the plaintiffs/respondents.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The parties will be referred to like what they were referred to before the High Court. Thus, Pamol (Sabah) Ltd will be referred to as the third defendant while Unilever Plc will be referred to as the fourth defendant. The third and fourth defendants are the appellants in this appeal.

[2] Pamol Plantations Sdn Bhd and Unipamol Malaysia Sdn Bhd are the first and second defendants respectively before the High Court.

[3] All the six plaintiffs are individuals having addresses of service in Sabah. They are businessmen who are identified as the sellers in the joint venture agreement.

[4] The first defendant is a private limited company incorporated in Malaysia with its principal place of business and registered address at Pamol Estate, Batu 814, Jalan Mersing, Kluang, Johor.

[5] The second defendant is also a private limited company incorporated in Malaysia with its principal place of business and registered address at Pusat Pamol, Ladang Pamol, Batu 81/4, Jalan Mersing, Kluang, Johor.

[6] The third defendant is a private limited company incorporated in England with its registered address at Unilever House, Blackfriars, London EC3 4BQ, United Kingdom.

[7] The fourth defendant is a public listed company incorporated in England with its registered address at Port Sunlight Wirral Merseyside, 1.62 4ZA, United Kingdom.

[8] By way of a summons in chambers, the third and fourth defendants filed an application to strike out the writ of summons and the statement of claim dated 4 December 2002 on the grounds that the plaintiffs' claims against the third and fourth defendants are scandalous, frivolous or vexatious and/or an abuse of the process of the court pursuant to O 18 r 19(1)(b) and/or (d) of the Rules of the High Court 1980 ('RHC') and/or the inherent jurisdiction of the High Court. The High Court heard and dismissed the third and fourth defendants' application to strike out the plaintiffs' writ of summons and the statement of claim. Aggrieved, the third and fourth defendants now appeal to this court.

THE FACTS AND THE LAW AND THE ANALYSIS THERETO

[9] The plaintiffs' claims are founded on, inter alia, a share sale agreement dated 9 April 1998 entered into between all the six plaintiffs and the first defendant and a shareholders agreement of the same date between all the six plaintiffs and the first, second and third defendants. The share sale agreement provided for the first defendant to purchase the shares of all the six plaintiffs in Pelangi Jadi Sdn Bhd ('Pelangi Jadi') on the terms and conditions contained in the share sale agreement. One of the pre-conditions to the share sale agreement

was the acquisition by all the six plaintiffs of no less than 20,000 acres of JV lands ('lands') and to have leases of those lands registered in the name of Pelangi Jadi. Now, the third and fourth defendants are not parties to the share sale agreement. The fourth defendant is also not a party to the shareholders agreement.

[10] The second defendant, prior to the commencement of this suit, instituted proceedings in Kota Kinabalu vide Civil Suit No K-22–148 of 2000 ('KK suit') against Unitangkob (Malaysia) Bhd ('Unitangkob') (formerly known as Pelangi Jadi and a company beneficially owned by ail the six plaintiffs) for recovery of a loan granted by the second defendant to Unitangkob to facilitate the purchase of the lands by all the six plaintiffs. The writ was filed sometime in August 2000 and sought for recovery of the sum in excess of RM5m in respect of the loan granted by Standard Chartered Bank Bhd to Unitangkob to facilitate the acquisition of the lands. Sometime on 26 July 2001, Unitangkob applied to amend its defence and to add a counterclaim to the KK suit. The proposed amended defence and counterclaim in the KK suit sought to plead as against the second defendant, breach of the agreements, misrepresentation, inequitable conduct and the defence of estoppel. It is said that the substance of the pleas contained in the proposed amended defence and counterclaim in the KK suit substantially on all fours and mirror the pleadings contained in the plaintiffs' statement of claim in the present suit.

[11] In the KK suit, Unitangkob identified the first, second and third defendants as parties to the agreements and also identified the first and third defendants as agents and or subsidiaries of the second defendant. The pleadings in the KK suit did not refer to the fourth defendant whether as the controlling mind and will of the first defendant, second defendant and third defendant. It is pointed out that the fourth defendant is not a party to the agreements and is a separate legal entity from the first, second and third defendants. In the KK suit, there was a notable absence of the present allegation against the fourth defendant of there being in existence a group enterprise structure in place. In sharp contrast, this fact is pleaded in the present suit.

[12] There is an affidavit in support of the application to amend the defence in the KK suit affirmed by Charles Lajangkip on behalf of Unitangkob. In that affidavit, it was averred that the amendment application was being made to ensure that 'all relevant issues' were clearly put before the court so as to ensure a fair and just disposal of the matter. Now, the relevant issues put before the court in the KK suit included references to the first defendant and third defendant but not the fourth defendant. And the relevant issues in the KK suit also did not include a reference to the allegations of conspiracy and fraud which have been pleaded in the present suit. All these clearly show that the fourth defendant was not a party to any of the transactions that form the subject

matter of the KK suit as well as the present suit. It is pointed out that the present suit hinged on the proposed defence and counterclaim in the KK suit and that being the case, the present suit is said to be an abuse of the process of the court.

[13] From the factual matrix, it is correct to say that the fourth defendant is not a party to either the share sale agreement or the shareholders agreement. The plaintiffs' claims against the fourth defendant for breaches of contract are misconceived and obviously unsustainable.

[14] The third defendant is not a party to the share sale agreement. The shareholders agreement was intended to regulate the relationship of the plaintiffs, the first, second and third defendants as shareholders of the first defendant. But it never came into being. The only connection between the third defendant and the shareholders agreement was the third defendant's then ownership of 49.99% of the paid up capital of the first defendant. It is submitted that that is insufficient to implicate the third defendant in this suit. And on 2 December 2002, the said shares were sold to Palmco Holdings Bhd. Thus, it is submitted that the plaintiffs' claim against the third defendant for breaches of contract is misconceived and obviously unsustainable.

[15] The plaintiffs' claims for alleged misrepresentation, conspiracy and fraud lie only against the first and second defendants. All the four defendants were at all material times separate legal entities possessed of separate rights and liabilities and traded in that way. All the plaintiffs have failed to particularise that plea in order to show that all the four defendants were operating as a group enterprise constituting one single commercial unit as distinct from being separate legal entities. It is trite that companies are separate legal entities even if they form part of a group of companies. And the liabilities of one company cannot be visited on another.

[16] At this juncture, it is ideal to set out the law. In company law, a company has personality that is distinct from that of its shareholders. This simple legal proposition emanates from the decision of the House of Lords in *Aron Salomon (Pauper) v A Salomon And Company, Limited, A Salomon And Company, Limited v Aron Salomon* [1897] AC 22 (HL). The brief facts may be stated as follows: For many years Aron Salomon had carried on a prosperous business as a leather merchant and wholesale boot manufacturer. He decided in 1892 to convert his business into a limited company. And for this purpose, he decided to form, 'Aron Salomon and Company, Limited' with liability limited by shares. Aron Salomon, his wife and five of his children subscribed to the memorandum of the company. All along it was their intention to retain the business in their own hands. The business was purchased by the company for £39,000 and the price was satisfied by (a) a sum amounting to £20,000 was paid to Aron Salomon

who then immediately returned it back to the company in exchange for fully paid shares; (b) a sum amounting to £10,000 was paid in debentures for the like amount; and (c) the balance sum, with the exception of about £1,000 which Aron Salomon had received and retained was used to discharge the debts and liabilities of the business at the time of purchase. Finally, apart from the fully paid shares, Aron Salomon also received approximately £1,000 in cash for his business as well as £10,000 in debentures. Unfortunately, one year after its incorporation, the company became insolvent and was liquidated. A debenture holder took an action on behalf of himself and all the other debenture holders against the company. In its counterclaim, the company, inter alia, averred that it was a mere nominee and agent of Aron Salomon and that the company or the liquidator for that matter was entitled to be indemnified by Aron Salomon against all the debts owing by the company to creditors other than Aron Salomon himself. The principal issue for the court to decide was whether the debenture that was originally issued to Aron Salomon was valid and therefore ranked in terms of priority higher than the unsecured creditors.

[17] Vaughan Williams J, the trial judge, held that the company was only an 'alias' or 'agent' for Aron Salomon and that being the case, Aron Salomon was personally bound to pay the unsecured creditors of the company. The Court of Appeal affirmed the decision of Vaughan Williams J but on different grounds. The Court of Appeal considered the relationship between the unsecured creditors and the company in the context of trustee and cestui que trust and held that the right of indemnity claimed had been established against Salomon. The House of Lords unanimously reversed the decision of the Court of Appeal and held that Aran Salomon was not personally liable. Lord MacNaughten aptly said at p 51 of the report:

> The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or the trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.

[18] *Salomon*'s case firmly entrenched the corporate personality principle. But there are situations where the courts look beyond that personality to see who are the members or directors of the company. This is what is known as lifting or piercing the corporate veil.

[19] It is acknowledged that the fourth defendant is not a party to the share sale agreement and the shareholders agreement. But the plaintiffs are seeking to lift the corporate veil and make the fourth defendant liable for the conduct of

its subsidiaries. The plaintiffs relied on the case of *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533, FC particularly to p 543 where Chong Siew Fai CJ (Sabah & Sarawak) said:

> … in cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies.

[20] However, it bears repetition to say that there was a failure on the part of the six plaintiffs to particularise the plea that all the four defendants operated as a group enterprise constituting one single commercial unit as distinct from being separate legal entities. In this context, we refer to the case of this court in *ATA Management Consultants Sdn Bhd v Makmuran Sdn Bhd* [2004] 3 CLJ 53 (CA), a judgment of Gopal Sri Ram JCA (later FCJ). There at pp 57–58, His Lordship had this to say:

> Since the respondent company did nothing to offend the terms of the agreement to which we have referred, no question of construction arises. It is a non-issue. The shareholders owned their shares. They could do with those shares as they wished. They did so. They sold it to a third party. That offended the agreement between the respondent and appellant not a jot. To cap it all, there was no plea taken before the learned judge that this was an appropriate case for the veil of incorporation to be lifted.

[21] There is also a passage in the judgment of Zakaria Yatim J (later SCJ) in *People's Insurance Co (M) Sdn Bhd v People's Insurance Co Ltd & Ors* [1986] 1 MLJ 68 that merits reproduction. There at pp 69–70, His Lordship had this to say:

> The plaintiff company is a legal entity by itself. Although it is a subsidiary of the first defendant company, the plaintiff company maintains its own separate entity. *In Ebbw Vale Urban District Council v. South Wales Traffic Area Licensing Authority* [1951] 2 KB 366, Cohen LJ said:
>
> > Under the ordinary rules of law, a parent company and subsidiary company, even a 100% subsidiary company, are distinct legal entities …

[22] There is therefore no necessity to lift or pierce the corporate veil of the fourth defendant.

[23] It is observed that the commencement of the present suit gives rise to a multiplicity of proceedings because it seeks an adjudication of matters that are currently the subject matter of dispute in the KK suit (*Jasa Keramat Sdn Bhd &*

Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637; [1999] 4 CLJ 533 (CA); and *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors* [2001] 6 MLJ 417).

[24] The rationale behind the rule against multiplicity of proceedings was also considered by the English Court of Appeal in the case of *Buckland v Palmer* [1984] 1 WLR 1109 where Sir John Donaldson MR, writing a separate judgment, observed at pp 1114–1115 that:

> The public interest in avoiding any possibility of two courts reaching inconsistent decisions on the same issue is undoubted and this alone would suggest that two actions based upon the same cause of action should never be allowed. Equally clear is the public interest in there being finality in litigation and in protecting citizens from being 'vexed' more than once by what is really the same claim.

[25] In responding to the third and fourth defendants' plea of multiplicity and abuse of process, the plaintiffs contend that they are not parties to the KK suit. The plaintiffs also contend that the KK suit was between the second defendant and Unitangkob. We say that the plaintiffs' responses are misconceived. Unitangkob (previously known as Pelangi Jadi) is a company beneficially owned by the plaintiffs. And pursuant to the share sale agreement, the plaintiffs were to secure 20,000 acres of JV lands and register them in the name of Pelangi Jadi. Pursuant to the shareholders agreement, the plaintiffs were to transfer their shares in Pelangi Jadi to the first defendant in exchange for the issue of shares in the first defendant subject to the terms and conditions of the shareholders agreement. The claims in the KK suit and in the present suit are the same. We say that the plaintiffs are precluded from raising in this suit what could have been litigated by them in the KK suit.

[26] The wider construction of the doctrine of res judicata was applied by the Privy Council in the case of *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and another* [1975] AC 581 (PC), where the appellant there was precluded from proceeding with the second suit against the respondents there and raising issues which could have been litigated in the first suit despite the fact that one of the respondents there in the second suit was not a party to the first suit. Lord Kilbrandon delivering the judgment of the Privy Council observed at pp 589–590 of the report in these erudite terms:

> The second question depends on the application of a doctrine of estoppel, namely res judicata. Their Lordships agree with the view expressed by McMullin J that the true doctrine in its narrower sense cannot be discerned in the present series of actions, since there has not been, in the decision in no. 969, any formal repudiation of the pleas raised by the appellant in No 534. Nor was Choi Kee, a party to No 534, a party to No 969. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.

[27] Next, we will now examine the allegations that the claim against the fourth and third defendants are an afterthought and mala fide. For this purpose, we will make reference to the KK suit. In that suit, Unitangkob identified the first three defendants in the present suit as parties to the agreements and identified the first and third defendants as agents and/or subsidiaries of the second defendant. But no reference was ever made to the fourth defendant in those pleadings whether as the controlling mind and will of the first, second and third defendants or at all.

[28] Again, in the KK suit there was no allegation against the fourth defendant or of there being in existence a group enterprise structure in place. But, this is pleaded in the present suit. It is crystal clear that the fourth defendant was not a party to any of the transactions that form the subject matter of the KK suit as well as the present suit.

[29] Again, the KK suit did not make reference to the allegations of conspiracy and fraud which have been pleaded in the present suit. And this is admitted by the plaintiffs in their affidavit in reply. Such allegations of conspiracy are mere afterthoughts and as far as the fourth and third defendants are concerned, they are an abuse of the process of the court.

[30] The timing of the present suit is clear evidence that it is an abuse of the process of the court. The varied allegations in the proposed defence and counterclaim in the KK suit were raised for the very first time in July 2001. At that point of time, no mention was made of the fourth defendant's involvement in the matters pertaining to the agreements. The fourth defendant sold its indirect shareholding in the first and second defendants to third parties by an agreement entered into on 2 December 2002. And the present suit was filed on 4 December 2002, a mere two days later.

[31] It must be borne in mind that the first prayer in the present suit was for an injunction to restrain the fourth defendant, whether by themselves or through their agents, from dealing with the proceeds of the sale of the first, second and third defendants up to a sum equivalent to the sum claimed in the statement of claim in the present suit. The proceeds of sale of Unilever's shareholding in the first, second and third defendants are clearly assets of the fourth defendant. And the only way to lay claim to those assets was to implicate the fourth defendant in those transactions referred to in the proposed amended defence and counterclaim in the KK suit. The introduction of the fourth defendant as a party in the present suit more than three years after the lapse of the agreements and whilst the KK suit was still pending smacked of an abuse of the process of the court.

[32] It is ideal that an action ought to be struck out if the process of the Court

has not been used in a bona fide manner and has been abused. Abdul Malik bin Ishak J (now JCA) in *Hadi bin Hassan v Suria Records Sdn Bhd & Ors* [2005] 3 MLJ 552; [2004] 8 CLJ 225, at p 545 (MLJ); p 245 (CLJ) aptly said:

> Striking out for being an abuse of the process of the court under O 18 r 19(1)(d) of the RHC envisages the situation where the process of the court has not been used in a bona fide manner and that it has been abused. It goes without saying that the court will prevent its machinery from being used improperly (*Castro v Murray* [1875] 10 Ex 213; and *Dawkins v Prince Edward of Saxe Weimar, Willis v Earl Beauchamp* [1886] 11 P 59, 63).

[33] In *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240 (FC), Abdoolcader J (later SCJ), writing for the Federal Court, remarked at p 242 that:

> The appellant which is an entirely distinct and separate juristic entity and personality was not a party to any of these matters.

and for these reasons, His Lordship further held at p 244 that:

> … it is abundantly clear that the respondent has no reasonable cause of action enforceable against the appellant, and the proceedings instituted by him against it are vexatious and frivolous and an abuse of the process of the court and obviously unsustainable.

[34] Low Hop Bing in *Indah Desa Saujana Corporation Sdn Bhd & Ors v James Foong Cheng Yuen & Anor, Judge, High Court Malaya* [2008] 2 MLJ 11; [2008] 1 CLJ 651, succinctly said at p 36 (MLJ); p 682 (CLJ) in regard to an abuse of the process of the court in this way:

> (83) The categories of abuse of process of the court are never closed and will certainly proliferate pursuant to the myriad of circumstances available from the factual matrix found in each particular case.
>
> (84) In *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin* [1988] 1 SLR 374 at p 384, the Singapore Court of Appeal explained the scope of 'an abuse of the process of the court' under O 18 r 19(1)(d) which is in pari materia with ours. The term has been given a wide interpretation by the courts and includes considerations of public policy and the interests of justice. It signifies that the process of the court must be used bona fide and properly and must not be abused. On the facts before us, the defendants have established an abuse of the process of the court.

[35] To recapitulate, the third defendant is not a party to the share sale agreement. But the third defendant is a party to the shareholders agreement. Consequently, we dismiss the appeal of the third defendant with costs of RM10,000. Half of the deposit to go to the plaintiffs respondents.

[36] In regard to the fourth defendant, to recapitulate, it is crystal clear that the fourth defendant is not a party to either the share sale agreement or the shareholders agreement. Consequently, we allow the appeal of the fourth defendant with costs of RM10,000. Half of the deposit, and that would be RM250, to be refunded to the fourth defendant.

[37] My learned brother Azhar Hj Ma'ah JCA has expressed his concurrence with this judgment. The other panel member, Kang Hwee Gee JCA has since retired.

Third defendant's appeal dismissed with costs but fourth defendant's appeal allowed with costs.

Reported by Kohila Nesan